Federal Court  Cour fédérale

Date: 20210413

Docket: IMM-5398-19

Citation: 2021 FC 319

Ottawa, Ontario, April 13, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

NGUYEN HUONG SEN LE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Nguyen Huong Sen Le, is a citizen of Vietnam who was enrolled as a student at Humber College studying business and accounting from September 2018. She held a valid student permit and a work permit, both expiring at the end of July 2020. The work permit was necessary for Ms. Le to complete a practicum, as part of her studies at Humber College. Further, the work permit indicated that the practicum must form an integral part of the studies.

[2] In August 2019, Wasaya Airways LP of Thunder Bay, Ontario, extended Ms. Le an offer of employment in a temporary accounting position for three months. Just prior to accepting the offer, Ms. Le enquired of the Humber College academic advisor in an email exchange whether she could take a break to try the job or whether it would affect her work permit. Regarding the latter issue, the academic advisor suggested that Ms. Le contact the International Centre because "they are experts when it comes to work permit issues."

[3] Upon Ms. Le's return to Canada in the same month from a short trip to the United States of America, a Canada Border Services Agency [CBSA] Immigration Officer interviewed Ms. Le, with the aid of a Vietnamese interpreter. The Officer prepared a report, under subsection 44(1) [Section 44 Report] of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*]. See Annex "A" for relevant provisions. The Officer concluded there were grounds to believe, on a balance of probabilities, that Ms. Le was inadmissible. The Officer provided reasons for the conclusion but did not make any recommendation regarding an exclusion order.

[4] The Minister's Delegate subsequently interviewed Ms. Le that day, again with the assistance of an interpreter, and found she was coming to Canada without having applied for and obtained a work visa and appropriate work permit. The Minister's Delegate considered that Humber College offered Ms. Le a co-op placement in Mississauga, as Ms. Le explained in the interview, but that the position with Wasaya Airways in Thunder Bay was not part of Humber College's program of study. Ms. Le thus was found inadmissible, for failing to comply with paragraph 41(a) the *IRPA*, and an exclusion order was issued. Ms. Le seeks judicial review of the decision of the Minister's Delegate to issue the exclusion order.

[5] I disagree with Ms. Le that there was a breach of procedural fairness or that the Minister's decision was unreasonable. For the more detailed reasons that follow, I thus dismiss this application for judicial review. My analysis includes a preliminary issue concerning the admissibility of the affidavit Ms. Le submitted on her judicial review application.

II. Standards of Review

[6] There is no disagreement in the case before me regarding the applicable standards of review. Breaches of procedural fairness in administrative contexts have been considered subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the *Baker* factors: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77. In sum, the focus of the reviewing court is whether the process was fair and just.

[7] Otherwise, the presumptive standard of review is reasonableness: *Vavilov*, above at para 10. A reasonable decision must be "based on an internally coherent and rational chain of analysis" and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at para 85. Courts should intervene only where necessary. To avoid judicial intervention, the decision also must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. The Court must avoid reassessing and reweighing the evidence before the decision maker; a decision may be unreasonable, however, if

the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, above at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

III. Analysis

(i) *Preliminary Issue –Applicant's Affidavit Only Partially Admissible*

[8] In my view, Ms. Le's affidavit is only partially admissible. Evidence not before the administrative decision maker that goes to the merits of the matter generally is not admissible on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Association of Universities and Colleges*] at para 19; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 17. The Court can make an exception, however, and accept evidence on which a party seeks to rely that (i) assists the Court to understand the general background circumstances, (ii) is relevant to an issue of procedural fairness or natural justice, or (iii) highlights a complete absence of evidence before the decision maker: *Association of Universities and Colleges*, above at para 20.

[9] With the above principles in mind, I find paragraph 2 of Ms. Le's affidavit admissible because it provides context concerning her second interview with the Minister's delegate and, therefore, is relevant to the allegation of breach of procedural fairness. Exhibit A to Ms. Le's affidavit, described in paragraph 8 as a selection of evidence before the CBSA, includes a clearer copy of Ms. Le's email exchange with the Humber College academic advisor than the copy contained in the certified tribunal record. I further find this material admissible.

[10] Exhibit A also includes, however, an email exchange with a representative of Wasaya Airways. Although the certified tribunal record contains a copy of the employment offer from such company, and an acceptance signed back by Ms. Le, it does not contain the email exchange found at pages 21-29 of the Application Record. I thus find the latter material inadmissible. I also find the information contained in paragraphs 3-7 of the affidavit inadmissible. The information either does not add anything to my understanding of the general background circumstances or could have been provided to the Minister's Delegate during the second interview but was not and, therefore, represents an unacceptable after-the-fact effort to augment or bootstrap the evidence: *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 145.

(ii) *No Breach of Procedural Fairness*

[11] I am not persuaded that there has been any breach of procedural fairness in the circumstances of the matter before me. The duty of fairness owed to a foreign national in Ms. Le's situation is at the low end of the spectrum: *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*] at para 29; *Marcusa v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1092 [*Marcusa*] at paras 21-22. She came to Canada under a student permit, was permitted to stay in Canada for a certain duration (less than two years) and subject to certain conditions, could not have had any expectation (based on the study and work permits issued to her) that she would be permitted to remain in Canada, and she has breached a significant condition of her right of entry (that the practicum must form an integral part of her studies): paraphrasing *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 [*Cha*] at para 47. Taking the *Baker* factors into account, the following participatory steps have been held to meet the duty of fairness (*Cha*, above at para 52):

- provide a copy of the immigration officer's report to the person;
- inform the person of the allegation(s) made in the immigration officer's report, of the case to be met and of the nature and possible consequences of the decision to be made;
- conduct an interview in the presence of the person, be it live, by videoconference or by telephone; and
- give the person an opportunity to present evidence relevant to the case and to express his point of view.

[12] Ms. Le was afforded all of the above participatory steps in this case. Further, this is not a case involving "a permanent resident [who] is entitled to a somewhat higher degree of participatory rights than a foreign national as a result of a greater establishment in Canada leading to more serious consequences in the event of removal": *Sharma*, above at para 29. Contrary to paragraph 2 of Ms. Le's affidavit and her written arguments, I find the record supports that Ms. Le was provided with ample opportunity to make submissions and present evidence. Further, there is insufficient evidence to support the allegations that the Minister's Delegate seemed in a rush, that Ms. Le was not given enough time to provide a clear answer, and that the Minister's Delegate already made up her mind to issue the exclusion order.

[13] Ms. Le was informed at the first interview that a report would be prepared for review by a senior officer regarding her admissibility and she indicated that she understood. Further, almost 4 hours elapsed from the end of the first interview with the CBSA Immigration Officer, who prepared the Section 44 Report, until the second interview with the Minister's Delegate and that interview lasted 2½ hours. Ms. Le was provided with the two-page Section 44 Report, it was explained to her including the officer's opinion that she was inadmissible and not authorized to

enter Canada, and she was given an opportunity to present "any new evidence that contradicts this officer's conclusion." In addition, she was assisted by a Vietnamese interpreter at both interviews and the adequacy of the interpretation is not in issue.

[14] In my view, the notes made by the Minister's Delegate, further to the interview with Ms. Le, demonstrate that the Minister's Delegate carefully considered Ms. Le's answers to questions put to her in both interviews and her personal circumstances, prior to issuing the exclusion order. I find these notes also demonstrate that the Minister's Delegate took into account the response Ms. Le provided, when asked if she had "any new evidence that contradicts this officer's conclusion," contrary to Ms. Le's arguments. It was Ms. Le's response, for example, that referred to the 84-hour placement in Mississauga that Humber College offered to her.

(iii) *Decision of Minister's Delegate Not Unreasonable*

[15] Contrary to Ms. Le's contention, I am not persuaded the decision of the Minister's Delegate was unreasonable. As I understand the argument, the decision was unreasonable because it was premised on the CBSA's erroneous finding that Ms. Le intended to work in Canada without an appropriate work permit. Ms. Le points to her email correspondence with the Humber College academic advisor and asserts the CBSA misapprehended and mischaracterized this evidence.

[16] In my view, the argument is tantamount to a request to reassess and reweigh the evidence, against which *Vavilov* cautions. Nonetheless, a certain degree of review of the evidence may occur when assessing the reasonability of an administrative decision maker's

decision: *Vavilov*, above at para 94. Having done so, I disagree that in the circumstances of the case before me the decision of the Minister's Delegate was unreasonable. Ms. Le repeatedly asked the academic advisor if she could take an official break for the fall semester in 2019 (so that she could pursue an internship placement far away from Toronto) and continued to do so, even after the advisor's suggestion that Ms. Le consult with the International Centre regarding the potential impact on her work permit.

[17] While Ms. Le added a postscript to one of her email messages to the academic advisor to the effect that she would check with "immigration advisor related to the permit," the very next email from Ms. Le to the academic advisor again asked if she could take an official break and again the academic advisor suggested that she should speak with the International Centre regarding taking a break. This exchange occurred just days before Ms. Le signed the employment offer from Wasaya Airways. In the interview with the Minister's Delegate, Ms. Le stated that she checked with the school coordinator if she could have a break from school or not and that the person she contacted was a general officer who could not provide the answer.

[18] In her notes, the Minister's Delegate acknowledges that Ms. Le contacted the academic advisor about quitting school for the fall semester. Based on the above email and interview exchanges, I find the conclusion by the Minister's Delegate not unreasonable, to the effect that Ms. Le did not consult with anyone else, apart from the academic advisor, such as a lawyer, immigration consultant, the International Centre or IRCC [Immigration Refugees and Citizenship Canada]. A conclusion is not unreasonable merely because inferences that differ from those of the decision maker reasonably could be drawn from the evidence; when considered

cumulatively, I am satisfied the evidence was sufficient on the whole to ensure that the decision of the Minister's Delegate could not be characterized as unreasonable: *Canada (Minister of Citizenship and Immigration) v Thanaratnam*, 2005 FCA 122 at para 34.

IV. Conclusion

[19] For the above reasons, I therefore dismiss this judicial review application.

[20] Neither party proposed a serious question of general importance for certification and I find that none arises in the circumstances of this case.

JUDGMENT in IMM-5398-19

THIS COURT'S JUDGMENT is that this judicial review application is dismissed; there is no serious question of general importance for certification in this matter.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act,* SC 2001, c 27**

Obligation on Entry **20 (1)** Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish, **(b)** to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	**Obligation à l'entrée au Canada** **20 (1)** L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver : **b)** pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.
Non-compliance with Act **41** A person is inadmissible for failing to comply with this Act **(a)** in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and **(b)** in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.	**Manquement à la loi** **41** S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.
Preparation of report **44 (1)** An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister. **Referral or removal order** **(2)** If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an	**Rapport d'interdiction de territoire** **44 (1)** S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre. **Suivi** **(2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit

admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

No permit required **186** A foreign national may work in Canada without a work permit **(f)** if they are a full-time student, on the campus of the university or college at which they are a full-time student, for the period for which they hold a study permit to study at that university or college; **(v)** if they are the holder of a study permit and **(i)** they are a full-time student enrolled at a designated learning institution as defined in section 211.1, **(ii)** the program in which they are enrolled is a post-secondary academic, vocational or professional training program, or a vocational training program at the secondary level offered in Quebec, in each case, of a duration of six months or more that leads to a degree, diploma or certificate, and **(iii)** although they are permitted to engage in full-time work during a regularly scheduled break between academic sessions, they work no more than 20 hours per week during a regular academic session;	**Permis non exigé** **186** L'étranger peut travailler au Canada sans permis de travail : **f)** à titre de personne employée sur le campus du collège ou de l'université où son permis d'études l'autorise à étudier et où il est étudiant à temps plein, pour la période autorisée de son séjour à ce titre; **v)** s'il est titulaire d'un permis d'études et si, à la fois : **(i)** il est un étudiant à temps plein inscrit dans un établissement d'enseignement désigné au sens de l'article 211.1, **(ii)** il est inscrit à un programme postsecondaire de formation générale, théorique ou professionnelle ou à un programme de formation professionnelle de niveau secondaire offert dans la province de Québec, chacun d'une durée d'au moins six mois, menant à un diplôme ou à un certificat, **(iii)** il travaille au plus vingt heures par semaine au cours d'un semestre régulier de cours, bien qu'il puisse travailler à temps plein pendant les congés scolaires prévus au calendrier;

(w) if they are or were the holder of a study permit who has completed their program of study and **(i)** they met the requirements set out in paragraph (v), and **(ii)** they applied for a work permit before the expiry of that study permit and a decision has not yet been made in respect of their application	**w)** s'il est ou a été titulaire d'un permis d'études, a terminé son programme d'études et si, à la fois : **(i)** il a satisfait aux exigences énoncées à l'alinéa v), **(ii)** il a présenté une demande de permis de travail avant l'expiration de ce permis d'études et une décision à l'égard de cette demande n'a pas encore été rendue
Canadian interests **205** A work permit may be issued under section 200 to a foreign national who intends to perform work that **(c)** is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely, **(i.1)** the work is an essential part of a post-secondary academic, vocational or professional training program offered by a designated learning institution as defined in section 211.1	**Intérêts canadiens** **205** Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes : **c)** il est désigné par le ministre comme travail pouvant être exercé par des étrangers, sur la base des critères suivants : **(i.1)** il constitue une partie essentielle d'un programme postsecondaire de formation générale, théorique ou professionnelle offert par un établissement d'enseignement désigné au sens de l'article 211.1
Subsection 44(2) of the Act — foreign nationals **228 (1)** For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be **(c)** if the foreign national is inadmissible under section 41 of the Act on grounds of **(iii)** failing to establish that they hold the visa or other document as required	**Application du paragraphe 44(2) de la Loi : étrangers** **228 (1)** Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause : **c)** en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à : **(iii)** l'obligation prévue à l'article 20 de la Loi de prouver qu'il détient les visa

under section 20 of the Act, an exclusion order,	et autres documents réglementaires, l’exclusion,

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5398-19
STYLE OF CAUSE:	NGUYEN HUONG SEN LE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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